

November 20, 2015

VIA ECFS

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

Re: Notice of *Ex Parte* Communication  
In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum  
Through Incentive Auctions, GN Docket No. 12-268 Broadcast Incentive Auction  
Comment Public Notice Auction 1000, 1001 and 1002, AU Docket No. 14-252

Dear Ms. Dortch:

On November 18 and 19, 2015, Ron Bruno of The Videohouse, Lawrence Rogow of WMTM, LLC, Ben Perez of Abacus Television, and Larry Morton (via phone) of KMYA, LLC (“Class A Petitioners”) met separately with (1) William Lake, Barbara Kriesman, Michelle Carey, Shaun Maher (via phone) of the Media Bureau, Mary Margaret Jackson, Gary Epstein, Howard Symons of the Incentive Auction Task Force, and David Konczal and William Scher from the Office of General Counsel, (2) Matthew Berry of the Office of Commissioner Ajit Pai, (3) Jennifer Thompson of the Office of Commissioner Rosenworcel, (4) Chanelle Hardy of the Office of Commissioner Clyburn, and (5) Robin Colwell of the Office of Commissioner O’Rielly.

During each meeting, the Class A Petitioners encouraged the grant of its pending Petition for Reconsideration of the *Second Report and Order of Reconsideration*.<sup>1</sup> The Class A Petitioners discussed that while the Spectrum Act<sup>2</sup> mandated that the FCC protect all full power and Class A stations that were licensed as of February 22, 2012, the statute does not preclude the Commission from protecting additional facilities. Indeed, in its original *Incentive Auction Order*, the Commission expressly recognized that it has discretion to protect additional stations and exercised this discretion to protect one station. It declined to extend protection to other

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<sup>1</sup> Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context, Second Order On Reconsideration, 30 FCC Rcd 6746 (2015) (“*Second Reconsideration Order*”).

<sup>2</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 §§ 6401 et seq., 125 Stat. 156 (2012)(“*Spectrum Act*”).

Class A eligible stations on the basis that “requiring protection of approximately 100 stations” would “encumber additional spectrum.”<sup>3</sup>

Then, surprisingly, in the *Second Reconsideration Order*, the Commission “clarified” its earlier ruling and extended its discretion to a wholly different group of Class A stations - stations that had never filed in this proceeding to request protection - while surgically designing the new protection criteria so as to exclude just these four Class A stations from protection.<sup>4</sup>

The Class A Petitioners also explained their position that the Commission’s decision in the *Second Reconsideration Order* to not protect these four stations, while deciding to protect many others, was based on serious factual and procedural errors. Those arguments, addressed in detail in our Petition for Reconsideration, are summarized in the attachment at Exhibit 1, which was distributed at each of our meetings.

The Class A Petitioners explained in these meetings, as they have done repeatedly in various filings, that they were working diligently to build their in-core Class A facilities. They had no notice until May 2014, more than two years later, that February 22, 2012 was the date that cut-off their protection for Incentive Auction purposes until well after each of them had built and filed a license for their respective stations.

The Class A Petitioners reiterated their request for the Commission to use May 29, 2015, the pre-auction licensing deadline, as the cut-off date for Class A protection. Every Class A station (or Class A eligible station) had ample notice that it must construct and license its station by this date or risk being left unprotected in the Incentive Auction. These four stations complied with this deadline and were licensed by this date. Additionally, each of these stations complied with the subsequent requirement to timely file a Form 2100, Schedule 381 (and a Petition for Eligible Entity Status because they were not included on the list of eligible stations).

Based on the Class A Petitioners exhaustive research, which was included in its Petition for Reconsideration and supported in comments filed in this this proceeding, these four stations are the only additional Class A stations that would be entitled to protection should the Commission grant their Petition for Reconsideration. Attached at Exhibit 2 is a summary of these findings that was distributed in each of our meetings.

Time is of the essence. The Class A Petitioners are harmed by each day that the Commission fails to act on its Petition for Reconsideration. The Commission has established the deadline to submit an application to participate in the Incentive Auction. Without prompt Commission action to grant the Petition for Reconsideration, the Class A Petitioners will be prohibited from participating in the Incentive Auction or from receiving repacking protection post-auction. Failure by the Commission to act on this Petition for Reconsideration prior to the Incentive Auction application window, which opens December 8, leaves the Class A Petitioners in the position of having to immediately seek court action to compel the Commission to act.

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<sup>3</sup> Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6567, ¶ 234 (2014) (“Incentive Auction R&O”).

<sup>4</sup> Notably, no party filed an objection to the Petition for Reconsideration. However, two parties filed in support of the Class A Petitioners, noting the inherent unfairness of the Commission’s actions and expressing concern that this denial could delay the Incentive Auction if the petitioners pursued court action.

In order to not further delay the Incentive Auction, Class A Petitioners affirm that they would be willing to waive its right to sixty (60) days notice of its opening bid price should the Commission grant its Petition for Reconsideration.<sup>5</sup>

Class A Petitioners encourage the Commission to act promptly to grant its Petition for Reconsideration of the *Second Report on Reconsideration*.

Respectfully submitted,

THE VIDEOHOUSE, INC.

ABACUS TELEVISION

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November 20, 2015

cc: Matthew Berry  
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Bill Scher  
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Mary Margaret Jackson  
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<sup>5</sup> Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, DA 15-1183 (WTB rel. Oct. 15, 2015) (Auction 1000 Application Procedures PN)



**Exhibit 1**

## **AUCTION ORDER RECONSIDERATION POINTS**

- We are here on behalf of The Videohouse, Inc. and WMTM, LLC, the licensees of Class A-eligible television stations WOSC-CD and WIAV-CD.
- These stations are legacy out-of-core Class A-eligible stations that obtained an in-core channel but, due to circumstances beyond our control, we were not able to file for a digital Class A license until after February 22, 2012.
- We did, however, comply with all of the subsequent requirements for protection in the auction, and our stations were licensed Class A stations by the pre-auction licensing deadline of May 29, 2015.
- To our knowledge, there are only four stations – ours and two others – that are in the same situation.
- First, let us give you some background.
  - In the Incentive Auction Order, the FCC decided not to extend discretionary protection to our stations, and instead to extend such protection to only one station – KHTV-CD.
  - The Videohouse and another party facing similar circumstances – Abacus Television which was the licensee of WPTD-CD at that time – filed petitions for reconsideration of that order. The petitions argued that their stations should have been protected. WMTM's predecessor also filed comments on the petitions for reconsideration, seeking similar relief for WIAV-CD.
  - In the Second Reconsideration Order, the FCC refused to protect these stations and denied the Videohouse and Abacus petitions. At the same time, it decided to protect a much larger group. That group consisted of *all* Class A-eligible stations that had a Class A conversion application pending or granted as of February 22, 2012. None of those stations filed timely petitions for reconsideration of the Incentive Auction Order, and many of them did not even request protection at all.
  - The Videohouse, Abacus, WMTM, and another similarly situated licensee filed a petition for reconsideration of the *Second Recon Order*. In it, they demonstrated why the FCC should have protected their stations. We wanted to meet with you today to discuss the arguments that we have raised.
- As our petition explains, the decision not to protect our stations was based on numerous factual errors.
  - *First*, the FCC decided to dismiss our arguments on procedural grounds, arguing that we had not presented them previously. But the test is not whether *we* presented the arguments, but whether any party to the proceeding did. Here, as we have shown in our

petition, numerous parties argued that the FCC should protect Class A stations not licensed as of February 22, 2012, in both comments and in ex parte presentations.

- *Second*, the FCC claims it reasonably found that our stations were not similarly situated to KHTV-CD, which it decided to protect given its substantial efforts to secure Class A status. In fact, our efforts were substantial, and were at least as substantial as the group of Class A-eligible stations that the FCC decided to protect in the *Second Recon Order*.
- *Third*, the FCC relied on its belief that over 100 additional stations would receive protection if it extended discretionary protection to Class A stations that had not applied for a license to cover by February 22, 2012.
  - The FCC has never provided any support for its assertion, nor has it agreed to provide a list of stations falling into this category.
  - In any event, it does not matter today how many unlicensed Class A-eligible stations existed when the Incentive Auction Order was released.
  - This is because there remain only four stations—those covered by our petition—that were Class A-eligible and have satisfied all of the requirements to receive protection in the auction. We have verified this using CDBS and other documents, as explained in our petition.
- The decision not to protect our stations was also procedurally improper in several respects.
  - *First*, the FCC exceeded the limits on its authority to resolve petitions for reconsideration.
    - Section 405 of the Communications Act permits the FCC to "grant[]" or "deny[]" a petition for reconsideration, but the Commission went further in the *Second Recon Order*.
    - The *Second Recon Order* said it was "addressing petitions for reconsideration," and did so by denying the Videohouse and Abacus petitions. This action fell within the FCC's statutory authority, but the FCC did not stop there. Instead, it extended discretionary protection to a completely different group of stations. None of these parties filed timely petitions for reconsideration of the Incentive Auction Order and many never requested protection at all.
    - Because no party specifically requested the broader relief in a petition for reconsideration, the FCC had no power to grant it.
    - The fact that Videohouse and Abacus had filed narrow petitions requesting relief different from what the FCC granted does not change this result. If the filing of *any* petition for reconsideration permitted the FCC to alter any aspect of its order, parties would be left in regulatory limbo until the FCC decided to address all petitions filed in a proceeding. This is inconsistent with the important interest in administrative finality.

- *Second*, even if the FCC's action on out-of-core Class A-eligible stations could be considered a reconsideration on the Commission's own motion or a declaratory ruling, it was procedurally flawed.
  - To be sure, there are two situations in which the FCC *can* change an order without a specific request for reconsideration. As an initial matter, the FCC didn't say it was relying on its authority to take such action in the *Second Recon Order*. In any event, neither of the situations was present here.
  - In the first type of case, the FCC can revise an order on its own motion, but it has to act within 30 days of the issuance of the order. Here, the *Second Recon Order* was issued more than a year after the Incentive Auction Order.
  - In the second, the FCC can sometimes issue a declaratory ruling to "terminate a controversy or remove uncertainty." Here, there was no "controversy" to resolve or "uncertainty" to remove, because the FCC had said it was going to extend discretionary protection to one station—KHTV-CD—and one station only.
- *Third*, the FCC's decision arbitrarily discriminated against us.
  - As we've mentioned, in the *Second Recon Order*, the FCC decided to exercise its discretion to protect all Class A-eligible stations that had a Class A conversion application pending or granted as of February 22, 2012, even though none of those parties filed timely petitions for reconsideration requesting that relief and many never requested it at all.
  - At the same time, the FCC faulted Videohouse and Abacus (as well as WMTM's predecessor) for failing to raise their arguments earlier in this proceeding.
  - The FCC never provided any reason for this discriminatory treatment, and we don't think there is any rational basis for it.
- In sum, we urge you to act favorably on our petition for reconsideration, and to extend discretionary protection to the four stations that it covers. Doing so is the only rational result, and is necessary to correct the injustice created by the treatment afforded out-of-core Class A-eligible stations in the *Second Recon Order*.



## **Exhibit 2**

As explained in the meeting, Class A Petitioners spent extensive resources trying to confirm how many Class A eligible stations had not filed licenses until after February 22, 2012 and could now be eligible for participation in the Incentive Auction if the Commission exercises its discretion to protect Class A Petitioners' stations. Petitioners confirmed that only **four** stations remain in play by analyzing the FCC's databases and other documents as described below.

The first paragraph below is language directly out of the Second Report and Order, where the Commission again affirmed that it believed there were approximately 100 Class A eligible, but unlicensed, stations as of February 22, 2012.

The chart below indicates the twelve Class A stations we located using CDBS that had not obtained a license as of February 22, 2012 (and were not otherwise granted protection by the Second Report and Order). Petitioners downloaded a snapshot of the CDBS database on May 29, 2015, pulling a list of all Class A licenses on file as of that date. They compared this list against the list of auction eligible Class A facilities included as an attachment to the Media Bureau's June 9, 2015 Public Notice announcing the stations eligible for participation in the incentive auction. There were twelve Class A stations that were included in the CDBS list of stations with a Class A license as of May 29, 2015 that were not included on the June 9, 2015 list of auction eligible stations.

The last section of the exhibit below indicates the current status of each of those twelve stations as of May 29, 2015. Again it demonstrates that only **four** stations that held a Class A licensee as of May 29, 2015, but were excluded from the July 9, 2015 list of auction-eligible stations and thus will be left unprotected—WOSC-CD, WPTG-CD, WIAV-CD, and KKYK-CD.

We affirm the statement in the Incentive Auction R&O that there are approximately 100 formerly out-of-core Class A-Eligible LPTV stations that had not filed an application for a license to cover a Class A facility as of February 22, 2012.<sup>193</sup> While the LPTV Coalition asserts that they have not been provided with a list of such stations, the stations falling in this category can be identified using the Consolidated Database System (“CDBS”).<sup>194</sup>

<sup>193</sup> Incentive Auction R&O, 29 FCC Rcd at 6670, para. 232. While Abacus claims that there are only 12 to 15 stations in this category, it incorrectly defines the category as formerly out-of-core Class A-eligible LPTV stations that filed for and received a Class A license after February 22, 2012. See Abacus Supplement at 9-10. This ignores the dozens of formerly out-of-core Class A-eligible LPTV stations that have not yet filed for a Class A license.

<sup>194</sup> Specifically, the number of stations in this category can be obtained by searching CDBS for all formerly out-of-core LPTV stations whose certifications of eligibility for Class A status were accepted by the Commission, see Certificates of Eligibility for Class A Television Station Status, Public Notice, 15 FCC Rcd 9490 (MB 2000), and then determining whether such stations obtained an in-core facility but had not filed an application for a license to cover a Class A facility as of February 22, 2012.

Call Sign	Facility ID	City	State	File Number	Channel	Service	Licensee
WPTG-CD	272	PITTSBURGH	PA	BLDTL20130702ABO	49	DC	ABACUS TELEVISION
KMAO-LP	2561	RAYMONDVILLE	TX	BLTTL19980722JG	50	CA	ARACELIS ORTIZ
KCOS-LP	8988	PHOENIX	AZ	BLTTA20010712AGX	28	CA	ARACELIS ORTIZ CORPORATION
KFLZ-LP	40782	SAN ANTONIO	TX	BLTVL20020417AAO	7	CA	B COMMUNICATIONS JOINT VENTURE
KKYK-CD	57548	LITTLE ROCK	AR	BLDTA20121012ACZ	16	DC	KMYA, LLC
WOSC-CD	66636	PITTSBURGH	PA	BLDTL20130327AEC	26	DC	THE VIDEOHOUSE, INC.
WRBD-LP	69994	PENSACOLA	FL	BLTVL19961016JF	8	CA	UPPER GULF COAST, L.L.C.
KBXS-CA	70420	SHREVEPORT	LA	BLTTA20030718ADM	50	CA	L4 MEDIA GROUP, LLC
WXSX-LP	70427	SAVANNAH	GA	BLTTL20060106ADJ	46	CA	L4 MEDIA GROUP, LLC
WNMF-LD	74513	MORRISTOWN	NJ	BLDTL20130325APT	17	DC	LOCAL MEDIA TV NEW YORK, LLC
WIAV-CD	168063	WASHINGTON	DC	0000001572	44	DC	WMTM, LLC
WDVB-CD	168834	EDISON	NJ	BLDTL20110113ABM	23	DC	LOCUSPOINT WDVb LICENSEE, LLC

#### **WPTG-CD's 302-CA was granted on 4/25/14.**

KMAO-LP's 302-CA was granted on 9/24/01, but they voluntarily reverted to LP in 2011 over failure to file form 398 Children's reports and the database was not updated.

KCOS-LP's 302-CA was granted on 10/18/01, but the station had its license cancelled on 10/7/14.

KFLZ-LP's 302-CA was granted on 8/02/02, but its license was cancelled on 6/12/15.

#### **KKYK-CD's 302-CA was granted on 7/18/12.**

#### **WOSC-CD's 302-CA was granted on 4/25/14.**

WRBD-LP's 302-CA was granted on 9/10/01, but the station reverted to LPTV status on 5/7/13 over failure to file form 398 Children's reports.

KBXS-CA's 302-CA was granted on 8/4/03, and the station will be eligible to participate in the spectrum auction according to a letter dated 7/17/15 placed in the station's correspondence folder by the FCC.

WXSX-LP's 302-CA was granted on 10/29/04, but was voluntarily reclassified as an LPTV station by the licensee on 5/20/15.

WNMF-LD had its 302-CA grant rescinded on 10/30/14.

#### **WIAV-CD's 302-CA was granted on 3/9/15.**

WDVB-CD's 302-CA was granted on 12/24/02, and the station will be eligible to participate in the spectrum auction according to a letter dated 6/25/15 and placed in the station's correspondence folder by the FCC.

Accordingly, **WPTG-CD, KKYK-CD, WOSC-CD, and WIAV-CD** appear to be the only four Class A television that had a Class A license on 5/29/15, and still have one, but have not been granted eligibility to participate in the incentive auction.